No. 93-1817

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

WASANG TOMAS MOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in permitting petitioner to testify as a defense witness at the trial of his co-conspirators without informing petitioner that a warrant had been issued for his arrest or advising petitioner of his *Miranda* rights.

2. Whether petitioner's testimony at the co-conspirators' trial was properly admitted at his own subsequent trial.

3. Whether the district court erred in refusing to allow petitioner to introduce evidence concerning the circumstances under which his testimony at the prior trial was given.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A70-A96) is reported at 16 F.3d 1324.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1994. The petition for a writ of certiorari was filed on May 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to possess and distribute cocaine and cocaine base, in violation of 21 U.S.C. 846; possessing cocaine and cocaine base with the intent to distribute those drugs, in violation of 21 U.S.C. 841(a)(1); using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c); and perjury, in violation of 18 U.S.C. 1623. The district court sentenced petitioner to life imprisonment, with an additional five-year consecutive sentence on the firearms count. Gov't C.A. Br. 3-4. The court of appeals affirmed.

1. Between 1986 and 1990, petitioner and Jorge Garcia ran a crack and cocaine distribution organization in Manhattan. Petitioner and Garcia employed several other persons to assist them in the drug distribution operation, including Raul Rodriguez. Pet. App. A73; Gov't C.A. Br. 5-11. In April 1991, a federal grand jury in the Southern District of New York returned an indictment charging Garcia and Rodriguez with offenses arising from their involvement in the drug distribution organization. Garcia and Rodriguez were tried before United States District Court Judge Mary Johnson Lowe. Pet. App. A73; Gov't C.A. Br. 2-3.

During the trial, Garcia called petitioner to testify as a defense witness. The prosecutor informed Judge Lowe at a sidebar conference that a warrant for petitioner's arrest had been issued and requested that federal agents be permitted to execute the warrant immediately. Judge Lowe denied the request, noting that "if they execute it now, [the government] will be depriving the defendant of a defense." Pet. App. A1-A2, A75; Gov't C.A. Br. 15-16.

After excusing the jury from the courtroom, Judge Lowe conferred with the prosecutor and defense counsel. Garcia's attorney informed Judge Lowe that two other persons who had been named as co-conspirators in the indictment but had not been charged would also be called as defense witnesses and stated that he had "told all of them they might subject themselves to arrest if they come to court." Rodriguez's counsel added that he had "told them to get an attorney." Judge Lowe then arranged for petitioner to be arrested out of sight of the jury after he had testified, stating that she did not want petitioner "to be aware of the arrest warrant * * * before he has completed his testimony[,] so as not to deprive the defendants of the benefit of his testimony." Pet. App. A2-A12, A75-A76; Gov't C.A. Br. 16.

Petitioner proceeded to testify on Garcia's behalf. He denied that he was involved in drug trafficking and testified that he had known Garcia for years and had never known him to sell or use drugs. Petitioner also testified that he had visited Garcia's apartment, which the evidence showed was the headquarters of the drug distribution operation. Petitioner acknowledged that he was aware that there was "always a chance" that he would be arrested if he appeared to testify, but explained that he "wanted to 'clear [his] name.'" Petitioner was arrested outside the courtroom after his testimony. Pet. App. A76; Gov't C.A. Br. 12-13, 16.

The jury was unable to reach a verdict on the charges against Garcia and Rodriguez, and Judge Lowe declared a mistrial. Pet. App. A73; Gov't C.A. Br. 3.

2. In August 1991, a superseding indictment was returned charging petitioner, Garcia, and Rodriguez with offenses arising from their participation in the drug distribution organization. In addition, petitioner was charged with perjury based on his testimony at the trial

of Garcia and Rodriguez. The case was reassigned from Judge Lowe to Judge Peter K. Leisure. Pet. App. A73-A74; Gov't C.A. Br. 3-4.

Petitioner moved to suppress his testimony at the prior trial, claiming, among other things, that he should have been given *Miranda* warnings before his testimony and that his statements were involuntary because he was not informed that he would be arrested after he testified. Judge Leisure denied the suppression motion. He held that petitioner was "not subject to custodial interrogation" when he testified at the prior trial and therefore was not entitled to *Miranda* warnings. The court also rejected petitioner's claim that his testimony was involuntary, noting that petitioner "was clearly on notice that he had been implicated in the conspiracy at issue, and that his appearance in court posed the danger of arrest."[1] Judge Leisure concluded that because petitioner "knew he was a suspect in this case" and nevertheless "voluntarily decided to appear in [c]ourt to testify, * * * the failure to explicitly inform him of the consequences of his actions" did not render his testimony involuntary. Pet. App. A19-A33, A76-A77; Gov't C.A. Br. 32-33.

Petitioner's testimony at the first trial was admitted into evidence at the second trial. Petitioner then sought to introduce evidence concerning the circumstances under which the testimony was given, including Judge Lowe's decision that he should not be informed of the arrest warrant until after he had testified. The district court excluded that evidence, concluding that peti-

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[1] The court observed that petitioner was "no stranger to the [f]ederal criminal justice system, having already been tried once and convicted." Pet. App. A30, A76-A77.

tioner's lack of knowledge of the arrest warrant was not relevant. Pet. App. A59-A67, A77.

3. In the court of appeals, petitioner contended that his testimony at the first trial was involuntary because he was not informed of the existence of the arrest warrant and that Judge Leisure therefore erred in admitting the testimony into evidence at the second trial. The court of appeals rejected that claim, explaining that knowledge of the existence of the arrest warrant and of his imminent arrest was "information that [petitioner] might have found useful," but that the denial of that information did not "vitiate[] the voluntariness of his decision to testify." Pet. App. A82. The court also questioned "whether the withheld information would have even made a difference," observing that petitioner's testimony showed that although he "did not have the specific knowledge of his impending arrest, he was generally aware of this danger and testified regardless." *Id.* at A82-A83. Thus, the court concluded that petitioner's "apparent understanding of his precarious situation, and disregard of this danger, is an additional basis for finding that the withholding of the information did not impact his free choice to testify."[2] *Id.* at A83.

Petitioner also claimed that Judge Lowe had "an independent obligation in the interest of fairness" to inform him of the existence of the arrest warrant before he testified. Pet. App. A83. The court of appeals

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[2] The court of appeals also rejected petitioner's claim that his testimony should have been suppressed because he was not given *Miranda* warnings before he testified. The court explained that petitioner "was neither in custody nor subject to official interrogation; rather, he came freely to court to testify on behalf of his colleagues." Pet. App. A78.

concluded, however, that Judge Lowe "was under no overriding obligation to inform [petitioner] of the impending arrest warrant" and that she acted within her discretion in withholding that information from petitioner. *Id.* at A86. Noting that "a district judge has the discretion to caution a witness as to the relinquishing of his constitutional privilege against self-incrimination," the court explained that "[d]iscretion to act, though, presupposes a discretion to *not* act. That a court has the *authority* to caution a witness does not imply that the court has an *obligation* to do so." *Ibid.* Although the court of appeals was "troubled by the district court's choice to deliberately delay the execution of an arrest warrant to ensure a witness's testimony at trial," it concluded that Judge Lowe's actions did not result in "fundamental unfairness that would require suppression of [petitioner's] testimony." *Id.* at A85-A86.

Finally, petitioner claimed that Judge Leisure erred in refusing to allow him to introduce at the second trial evidence concerning the circumstances under which his testimony at the first trial was given. Petitioner relied on 18 U.S.C. 3501(a), which provides that once a trial judge determines that a "confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." The court of appeals rejected petitioner's claim, concluding that Section 3501 was inapplicable in determining the admissibility of the underlying circumstances of petitioner's trial testimony. Pet. App. A88-A90. The court explained that 18 U.S.C. 3501(d) limits the applicability of Section 3501 by excluding from its coverage

confessions that were "given without interrogation" or given by persons who were "not under arrest or detention at the time the statement was made."[3] Pet. App. A88. Because petitioner was not subject to "interrogation" or "under arrest or detention" during his trial testimony, the court stated, "[b]oth of these limitations [set forth in Section 3501(d)] apply in this case." *Id.* at A89. The court concluded that petitioner "cannot therefore rely on § 3501 to require the admission of the circumstances of his testimony in the first trial." *Id.* at A90.

ARGUMENT

1. Petitioner contends (Pet. 10-20) that Judge Lowe was required to advise him of his right to counsel and right against compulsory self-incrimination before permitting him to testify at the trial of his co-conspirators. The court of appeals correctly concluded, however, that Judge Lowe acted within her discretion in allowing petitioner to testify without advising him of his rights. Courts have agreed that "[t]he district court has the discretion to warn a witness about the possibility of incriminating himself." *United States* v. *Arthur*, 949 F.2d 211, 215 (6th Cir. 1991); see also *United States* v. *Smith*, 997 F.2d 674, 680 (10th Cir.), cert. denied, 114 S. Ct. 357 (1993); *United States* v. *Silverstein*, 732 F.2d 1338, 1344-1345 (7th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Morrison*, 535 F.2d 223, 228 (3d Cir. 1976). As the court of appeals explained (Pet. App.

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[3] Section 3501(d) provides that "[n]othing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention."

A86), the district court also has discretion not to provide such a warning: "That a court has the *authority* to caution a witness does not imply that the court has an *obligation* to do so." Thus, no court has held that the district court is required to warn witnesses of the danger of self-incrimination; to the contrary, "as a general rule there is no duty to advise a *witness* in court * * * of his right not to incriminate himself." *United States* v. *Morrison*, 535 F.2d at 228.[4]

2. Petitioner also contends (Pet. 20-26) that his testimony at the first trial was involuntary because he was unaware of his imminent arrest when he testified. This Court has made clear, however, that a defendant need not be aware of all of the circumstances and consequences of his actions in order for his confession to be voluntary. See *Oregon* v. *Elstad*, 470 U.S. 298, 316 (1985) ("This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness"); see also *Colorado* v. *Spring*, 479 U.S. 564, 576-577 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 422-424 (1986). Thus, petitioner's lack of knowledge of the warrant for his arrest was a factor that the courts below could consider in evaluating the voluntariness of petitioner's testimony, but was not sufficient by itself to render his testimony

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[4] The court of appeals also correctly rejected petitioner's claim that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), required the district court to advise him of his rights before permitting him to testify at the first trial. Because petitioner was not in custody or subject to interrogation during his trial testimony, he was not entitled to *Miranda* warnings. See *United States* v. *Kilgroe*, 959 F.2d 802, 804-805 (9th Cir. 1992) ("putative defendant" who was subpoenaed to testify as defense witness and subjected to cross-examination by prosecutor was not entitled to *Miranda* warnings before testifying).

involuntary. Cf. *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969) (fact that police officer questioning defendant misrepresented statements of another suspect was "insufficient * * * to make [the defendant's] otherwise voluntary confession inadmissible").

Moreover, in ruling that petitioner's trial testimony was voluntary, the district court specifically found that petitioner "was clearly on notice that he had been implicated in the conspiracy at issue, and that his appearance in court posed the danger of arrest." Pet. App. A19. The court of appeals agreed that petitioner was "generally aware" of the danger that he would be arrested and "testified regardless."[5] *Id.* at A83. Under the circumstances of this case, including petitioner's "apparent understanding of his precarious situation, and disregard of this danger" (*ibid.*), the court of appeals correctly concluded that petitioner's ignorance of his imminent arrest did not render his testimony involuntary. That fact-bound determination warrants no further review.

Petitioner also asserts (Pet. 22-24) that Judge Lowe had a "legal and moral duty" to advise him of the existence of the arrest warrant and that her failure to do so caused his testimony to be involuntary. He cites Fed. R. Crim. P. 4(c), which provides that an arrest warrant shall "command that the defendant be arrested and brought before the nearest available magistrate judge,"

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[5] Although petitioner appears to challenge the finding of both courts below that he was aware of the danger of arrest when he testified at the first trial (Pet. 24-25), he provides no basis for further review of that factual determination. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *District Director*, 385 U.S. 630, 635 (1967).

and Fed. R. Crim. P. 5(a), which requires an "officer making an arrest under a warrant" to "take the arrested person without unnecessary delay before the nearest available federal magistrate judge." Petitioner claims (Pet. 23-24) that these provisions required Judge Lowe to have the warrant immediately executed and petitioner arraigned.

Petitioner's reliance on Rules 4(c) and 5(a) is misplaced. The requirement of Rule 4 that the warrant shall "command that the defendant be arrested" refers to the form of the warrant, not the timing of its execution. Similarly, the reference in Rule 5 to "unnecessary delay" addresses the procedure to be followed after a defendant has been arrested for a federal crime. Cf. *United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1603-1604 (1994). It confers no rights on a defendant as to the timing of an arrest. Cf. *Hoffa* v. *United States*, 385 U.S. 293, 309-310 (1966).

3. Finally, petitioner renews his claim (Pet. 27-35) that 18 U.S.C. 3501(a), which provides that a district court must "permit the jury to hear relevant evidence on the issue of voluntariness" of a "confession" that is admitted into evidence, required Judge Leisure to admit evidence at the second trial concerning the circumstances under which his testimony at the first trial was given. The court of appeals correctly held (Pet. App. A88-A89), however, that 18 U.S.C. 3501(d) creates an exception to the requirements of Section 3501 for confessions "given without interrogation" or given by persons who were "not under arrest or detention at the time the statement was made."[6] See *United States* v.

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[6] *United States* v. *Kampiles*, 609 F.2d 1233 (7th Cir. 1979), cert. denied, 446 U.S. 954 (1980), on which petitioner relies (Pet. 30), is not to the contrary. In that case, the court applied Section 3501 to

Alvarez-Sanchez, 114 S. Ct. at 1604 (defendant who has been arrested by state officers may not claim protections of Section 3501, which covers only those under "arrest or other detention" for a *federal* crime, citing, *inter alia*, 18 U.S.C. 3501(d)); *United States* v. *Poschwatta*, 829 F.2d 1477, 1482 (9th Cir. 1987) (upholding district court's determination that Section 3501 "contemplated custodial interrogation" and that defendant's statements during telephone conversation with federal agents "did not come within the scope of the statute"), cert. denied, 484 U.S. 1064 (1988); *United States* v. *Bailey*, 728 F.2d 967, 970 (7th Cir.) (Section 3501(d) "creates an exception to the procedural requirements of section 3501"), cert. denied, 467 U.S. 1229 (1984); *United States* v. *Diezel*, 608 F.2d 204, 207 n.6 (5th Cir. 1979) (same); *United States* v. *Bernett*, 495 F.2d 943, 972 (D.C. Cir. 1974) (Wilkey, J., concurring) (same). Because petitioner was not subject to custodial interrogation when he testified at the first trial, Section 3501 was inapplicable to petitioner's testimony.

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statements made by the defendant in response to questioning by FBI agents during meetings at an FBI field office, which the court of appeals "assum[ed]" were "custodial in character." 609 F.2d at 1242.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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